UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADECCO USA, INC.,	)	
	)	
Respondent,	)	
	)	
and	)	**Case 13-CA-175962**
	)	
MICHELE MIMS,	)	
	)	
an Individual.	)	

RESPONSE TO NOTICE TO SHOW CAUSE

COMES Respondent Adecco USA, Inc. ("Adecco") and, in response to the Notice to Show Cause issued by the Board on November 4, 2016, shows as follows:

1. Adecco submits that the Board should either (i) deny the General Counsel's Motion for Summary Judgment and instead enter summary judgment in Adecco's favor or else (ii) stay proceedings pending resolution of the issues raised by the Board's own certiorari petition to the Supreme Court in NLRB v. Murphy Oil USA, Inc., No. 16-307, and by other pending certiorari petitions.

2. The General Counsel has already noted the similarities between this matter and the proceedings in Adecco USA, Inc., 364 NLRB No. 9 (2016); rather than re-argue those same issues here, Adecco incorporates by reference all arguments it raised in its Opening Brief on Petition for Review of the Board's Decision and Order in that proceeding (**Exhibit 1**).

3. Adecco, for reasons **Exhibit 1** sets forth, asks that the Board deny the

General Counsel's Motion for Summary Judgment and enter summary judgment in Adecco's favor based on arguments and authorities cited in the attached **Exhibit 1**, including, but not limited to, the following arguments and authorities:

- Adecco's Arbitration Agreement, including its class-waiver provisions, is valid and enforceable under controlling law. See, e.g., Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015), D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 355-62 (5th Cir. 2013).

- Even if the Supreme Court were to reverse on certiorari in Murphy Oil, Adecco's Arbitration Agreement contains an opt-out that differentiates Adecco's Agreement from the agreement at issue in Murphy Oil. See, e.g., Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1077 (9th Cir. 2014) (finding no violation of the NLRA when the arbitration agreement contained an opt-out).

- Even if the Supreme Court were to find class-action waivers like the one contained in Adecco's Arbitration Agreement to be unlawful, the Board cannot require Adecco to reimburse Charging Party for her expenses, including attorneys' fees, incurred in opposing Adecco's motion to compel arbitration in Illinois Circuit Court. See, e.g., BE&K Constr. Co. v. NLRB, 536 U.S. 516, 529-36 (2002); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 748-49 (1983).

- Adecco's optional Arbitration Agreement also contains a sufficient carve-out that allows employees choosing arbitration to pursue claims and charges before the Board. See, e.g., Murphy Oil, 808 F.3d at 1019 (recommending that a carve-out for Board proceedings would be sufficient to cure any "confusing" or "incompatible" language).

- The General Counsel's request for a nationwide posting remedy is inappropriate, especially on summary judgment and without development of any factual record regarding other employees. See, e.g., McGraw-Edison Co. v. NLRB, 533 F.2d 1266, 1268-69 (D.C. Cir. 1976) (amending Board order that was "overly broad" and caught "within its sweep ... a number of otherwise valid management practices").

4. Alternatively, the Board itself could stay consideration of the General Counsel's Motion for Summary Judgment for the reasons that the General Counsel

has already explained in the Adecco USA proceeding referenced above[1]; a stay is also appropriate here because the Illinois Circuit Court has yet to rule on whether Adecco's Arbitration Agreement is enforceable.[2]

Conclusion

For the reasons set forth above and in the attached **Exhibit 1**, Adecco asks that the Board either (i) deny the General Counsel's Motion for Summary Judgment and instead enter summary judgment in Adecco's favor or else (ii) stay proceedings.

Dated: November 18, 2016

Respectfully submitted,

/s/ John J. Coleman, III
John J. Coleman, III
Marcel L. Debruge
Devin C. Dolive

Attorneys for Respondent
Adecco USA, Inc.

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[1] *See* **Exhibit 2** (Mot. for Abeyance); **Exhibit 3** (Mot. to Stay). Although the United States Court of Appeals for the Fifth Circuit rejected the stays that the General Counsel's Office requested on the Board's behalf, the Board, in the present proceeding, could have the benefit of the Supreme Court's rulings on the certiorari petitions if the Board itself were to stay consideration of the Motion for Summary Judgment here. See, e.g., Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980) ("When [the Board] disagrees in a particular case, it should seek review in the Supreme Court. During the interim ... while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one.").

[2] Compare GC's Mot. at 5 ¶ 5 (noting Adecco has moved to compel arbitration in Illinois Circuit Court) with Adecco USA, 364 NLRB No. 9, slip op. at 2 n.2 (noting that Adecco had obtained an order compelling arbitration from the United States District Court for the Northern District of California).

OF COUNSEL:

BURR & FORMAN LLP
420 North 20th Street
Wells Fargo Tower, Suite 3400
Birmingham, Alabama 35203
Telephone: 205-251-3000
Facsimile: 205-458-5100
jcoleman@burr.com
mdebruge@burr.com
ddolive@burr.com

Vanessa S. Hodgerson
Associate General Counsel
ADECCO GROUP NA
10151 Deerwood Park Blvd.
Building 200, Suite 400
Jacksonville, FL 32256
Telephone: 904-513-5177
Facsimile: 904-360-2506
Vanessa.Hodgerson@adeccona.com

CERTIFICATE OF SERVICE

I certify that on November 18, 2016, a copy of the foregoing document was filed with NLRB Executive Secretary via the National Labor Relations Board's electronic filing system, and served a copy of the foregoing by electronically or via U.S. Mail upon the following:

Daniel Nelson (Via Electronic Filing)
Acting Regional Director
Emily O'Neill
Counsel for the General Counsel (Via Electronic Filing)
National Labor Relations Board
Regions 13
Dirksen Federal Building
219 South Dearborn Street
Suite 808
Chicago, Illinois 60604-2720

Michelle Mims (E-Mail at cwilliams@wagetheftlaw.com)
c/o Christopher J. Williams, Esq.
Workers' Law Office, PC
53 W. Jackson Blvd., Suite 701
Chicago, Illinois 60604

/s/ John J. Coleman, III
OF COUNSEL

EXHIBIT 1

No. 16-60375

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.,

Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner.

On Petition for Review of Order and Decision of the
National Labor Relations Board
No. 32-CA-142303

PETITIONER'S OPENING BRIEF

STEPTOE & JOHNSON LLP
Steven D. Wheeless
swheeless@steptoe.com
Douglas D. Janicik
djanicik@steptoe.com
201 E. Washington St.
Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200

Attorneys for Petitioner Adecco USA, Inc.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Petitioner-Cross-Respondent Adecco USA, Inc. states that ADO Staffing, Inc. is the parent corporation of Adecco USA, Inc., and owns more than 10% of Adecco USA, Inc.'s stock.

The undersigned counsel in this appeal (5th Cir. No. 16-60375, *Adecco USA, Inc. v. NLRB*) certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Charging Party:

Rajan Nanavati

B. Charging Party's Counsel:

Velton Zegelman P.C.
Kevin R. Allen
Daniel Velton

C. NLRB Counsel:

Linda Dreeben
Jared Cantor
Kira Vol
George P. Velastegu
Judy Chang

D. Petitioner's Counsel:

Steven D. Wheeless
Douglas D. Janicik

By s/ Douglas D. Janicik
Steven D. Wheeless
Douglas D. Janicik
Attorneys of Record for Petitioner
Adecco USA, Inc.

STATEMENT REGARDING ORAL ARGUMENT

The issues in this appeal remain important for employers operating in this Circuit (as well as across the country), given the favored use of arbitration agreements and the U.S. Supreme Court's mandate that arbitration agreements be enforced according to their terms absent a clear and express Congressional mandate to the contrary. In particular, Adecco USA, Inc. ("Adecco") believes that oral argument would assist the Court because the National Labor Relations Board majority relied on two independent grounds to invalidate Adecco's employee arbitration agreement, and its alternative ground raises new issues regarding the proper interpretation of provisions in such agreements preserving—through express language—employees' right to pursue administrative charges with the Board. If the Board's flawed approach is left unchecked, it will thwart the Federal Arbitration Act's emphatic policy in favor of arbitration agreements.

Also, this appeal involves an important issue regarding the Board's authority to award certain broad relief that it is unduly burdensome on national employers like Adecco. Accordingly, Adecco respectfully requests oral argument.

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INTRODUCTION

This is yet another chapter in the National Labor Relations Board's ongoing dispute with this Court over the enforceability of class action waivers in employee arbitration agreements. In this case, Adecco and its former employee Rajan Nanavati agreed to arbitrate their disputes on an individual basis, waiving the right to bring class actions or other collective proceedings. When Nanavati brought a putative class action against Adecco, the federal district court enforced the agreement, rejecting his claim that it violated his right to engage in concerted activity under the National Labor Relations Act. The Board later ruled the opposite, relying on its decisions in *D.R. Horton, Inc. v. NLRB* and *Murphy Oil USA, Inc. v. NLRB*, both of which this Court had rejected. 737 F.3d 344 (5th Cir. 2013); 808 F.3d 1013 (5th Cir. 2015).

Adecco's agreement presents an even more compelling reason for denying enforcement of the Board's order: Adecco gave Nanavati the *choice* to opt out of the agreement (which he didn't do). Nevertheless, not only did the Board order Adecco to reject its arbitration agreement contrary to this Court's directives, it awarded Nanavati his attorneys' fees in opposing Adecco's successful motion to compel arbitration, also contrary to this Court's precedent. Once again, this Court must correct the Board's contrary rulings.

But the Board didn't stop there. It also asserted that the agreement interfered with Nanavati's right to file unfair labor practice ("ULP") charges with the Board, even though he in fact filed a charge with the Board (which led to this Petition) and the agreement itself *expressly* carves out ULP charges from its scope.

Time and time again, the U.S. Supreme Court has made clear that, absent express contrary Congressional intent, arbitration agreements must be enforced according to their terms. And yet, time and time again, as in this case, the Board disregards that mandate in an apparent effort to rid the workplace of arbitration agreements freely entered into by employers and employees. Accordingly, Adecco requests that this Court grant its Petition and deny enforcement.

JURISDICTIONAL STATEMENT

This Court has jurisdiction in this matter pursuant to Section 10(f) of the NLRA because the Board's May 24, 2016 "Decision and Order" is a final order. *See* 29 U.S.C. § 160(f). Adecco is a party aggrieved by the Board's Decision and Order. Adecco transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by operating offices in Louisiana, Texas, and Mississippi at which it places temporary employees at its client sites in those states (and elsewhere).

ISSUES PRESENTED FOR REVIEW

1. Whether the class action waiver in Adecco's employee arbitration agreement, which includes a provision whereby the employee can unilaterally

choose to opt out of the agreement without any repercussions, is lawful and enforceable under binding precedent.

2. Regardless of whether Adecco's class action waiver is valid and enforceable, whether the First Amendment right of access to the courts bars enforcement of the Board's award of attorneys' fees that Nanavati incurred in opposing Adecco's successful motion to compel arbitration in his now-settled lawsuit.

3. Whether the Board majority erred in concluding that Adecco's arbitration agreement interferes with employees' right to file ULP charges with the Board, where the agreement specifically states that "regardless of any other terms" of the agreement, the employee may still file ULP charges with the Board.

4. Assuming this Court does not grant Adecco's Petition for Review of the Board's Order regarding its arbitration agreement, whether the Board majority's requirement that Adecco (i) post a notice of violation in each and every facility throughout the U.S. where the agreement "has been in effect" *and* (ii) issue identical notices company-wide via electronic means, was arbitrary and capricious where the Board already required that Adecco give personal notice to each and every employee who signed the arbitration agreement.

STATEMENT OF THE CASE

Adecco is one of the largest staffing companies in the United States. (Administrative Record on Appeal ("ROA") 59.)[1] Its business involves recruiting and employing temporary employees who are then staffed at Adecco's various client sites. (*Id*.)

Adecco's branch office in San Bruno, California hired Rajan Nanavati on January 21, 2014. (ROA.99.) Adecco placed Nanavati at a nearby Google facility, where he worked as a dispatcher for about four months. (ROA.59.)

A. Nanavati voluntarily enters into an arbitration agreement that requires the parties to bring claims on an individual basis.

Before starting his employment, Nanavati and Adecco entered into a "Dispute Resolution and Arbitration Agreement" (the "Agreement"). The Agreement specifies that the parties—both Adecco and Nanavati—must arbitrate any claims they have against each other relating to the Agreement or his employment, and that they agree to waive their rights to bring claims against each other in a class action or other collective proceeding:

> The Company and Employee agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration ….. The agreement to arbitrate includes any claims that the Company may

[1] Citations to the record are to the hard copy administrative record (pp. 1-117) that the NLRB filed on July 26, 2016.

> have against Employee, or that Employee may have against the Company … *except as set forth below*.

(ROA.19 (emphasis added).) The Agreement also contains a waiver of the right to bring class or collective actions ("Class Action Waiver"):

> [T]he parties agree that each may bring claims against the other only in their individual capacity, and not as a plaintiff or class member in any purported class and/or collective proceeding.

(ROA.20 (emphasis added).)

As the "except as set forth below" proviso signals (see above), there are exceptions to the parties' agreement to arbitrate and Class Action Waiver. Significant here is the Agreement's exception for proceedings before certain agencies, including the NLRB:

> *Regardless of any other terms of this … Agreement*, claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitations claims or charges brought before the … National Labor Relations Board (www.nlrb.gov).....

(ROA.19 (emphasis added).)

Adecco delivered the Agreement to Nanavati as part of his "onboarding process," much of which occurs over e-mail and the Internet. (ROA.59-60.) Included in the package of materials Nanavati received were instructions on how to

opt-out of the Agreement if he so chose. (ROA.107.)[2] Moreover, the Agreement itself reiterates that Nanavati had the choice to opt-out entirely:

> Within 30 days after signing this Agreement, Employee may submit a form stating that Employee wishes to opt out and not be subject to the … Agreement…. An Employee who opts out as provided in this paragraph *will not be subject to any adverse employment action as a consequence of that decision* and may pursue available legal remedies without regard to the … Agreement. Should Employee not opt out of the … Agreement in a timely manner, Employee and the Company will be deemed to have mutually accepted … [its] terms.

(ROA.20 (emphasis added).)

Nanavati did not choose to opt out of the Agreement. Instead, he signed and submitted the Agreement on January 21, 2014 (*id*.), and also clicked "Yes" to the following statement to confirm his agreement to use an electronic signature:

> By providing your electronic signature below, you:
>
> - Agree that your electronic signature holds the same value as your signature.
> - Agree that you have fully read and understand all information preceding your electronic signature in each location where your electronic signature appears.
>
> … I certify that the above information is true and correct, and I agree to the conditions of hiring.
>
> Your Signature: Rajan Nanavati e-Sign – I Agree Date: 1/21/2014

(ROA.102.)

[2] The Agreement contained a link that Nanavati could "click" for the opt-out form. (ROA.96, 105.)

Nanavati began working six days later. (ROA.59.) At no time thereafter did he submit the form Adecco provided him to opt out of the Agreement. (ROA.62.)

B. Nanavati sues Adecco, which successfully moves to compel arbitration.

On August 11, 2014, Nanavati filed a class action wage and hour lawsuit against Adecco in California state court. (ROA.36-56.) Following removal, on November 21, 2014, Adecco moved to compel arbitration of Nanavati's claims under the terms of its Agreement with him. (ROA.23.)

On April 13, 2015, the U.S. District Court for the Northern District of California granted Adecco's motion, concluding that the Agreement was enforceable and ordering that Nanavati proceed with his claims, on an individual basis, in arbitration. *See Nanavati v. Adecco USA, Inc.*, 99 F. Supp.3d 1072, 1078-79, 1083 (N.D. Cal. 2015). The district court found that Nanavati's Agreement "clearly and simply described [Adecco]'s alternative dispute resolution program and the contours of the parties' agreement to arbitrate. The arbitration agreement permitted [Nanavati] to opt out within 30 days without any negative consequence." *Id*. at 1078-79. The onboarding process, the district court also found, "afforded ample opportunity to opt out of the [Agreement]." *Id*. at 1079. Ultimately, the district court concluded that Nanavati "made a *fully informed and voluntary* decision to accede to the Agreement." *Id.* at 1079 (quotations omitted & emphasis added).

C. Nanavati asks the NLRB to undo the Agreement he made with Adecco.

On December 5, 2014, Nanavati filed a ULP charge against Adecco, alleging that his Agreement was unlawful under the NLRA. (ROA.18.) On May 29, 2015, the NLRB's Regional Director issued a Complaint and Notice of Hearing. (ROA.21-27.) The Complaint alleged two separate unfair labor practices: (i) Adecco maintained an agreement with a Class Action Waiver that interferes with employees' Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation;[3] and (ii) Adecco sought to enforce (and did enforce) its unlawful Class Action Waiver in Nanavati's wage and hour lawsuit.[4] (ROA.22-24.)

On August 3, 2015, the Region Director filed a motion (i) to transfer the ULP proceeding to the NLRB, and (ii) for summary judgment on the Complaint allegations. (ROA.3.) Adecco did not consent to the transfer. (ROA.2.)

[3] NLRA section 7, 29 U.S.C. § 157, gives employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(b), 29 U.S.C. § 158(b), makes it an unfair labor practice for a labor organization to "retrain or coerce … employees in the exercise of the rights guaranteed in" Section 7.

[4] The Complaint also included an allegation that Adecco "promulgated" an unlawful class action waiver, but the Board rejected that claim as untimely because Adecco implemented its Agreement more than six months before Nanavati filed his ULP charge. (ROA.109.)

On August 24, 2015, the NLRB transferred the case to itself and issued an order to show cause "why summary judgment should not be granted in favor of either party." (ROA.65.) On September 8, 2015, the Regional Director and Adecco filed their responses to the Board's order to show cause. (ROA.67-90.)

D. The NLRB finds Nanavati's agreement to arbitrate unlawful even though he chose not to opt out of it.

1. The Board majority relies on cases in which this Court denied enforcement.

On May 24, 2016, the Board issued the Decision and Order that is the subject of this Petition for Review. In a 2-1 decision, with one member dissenting, the Board relied on its prior decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), both of which found that mandatory arbitration agreements requiring employees to waive the right to commence or participate in class or collective actions violate employees' NLRA Section 7 rights. (ROA.109-10.) Although this Court rejected the Board's reasoning in *D.R. Horton*, 737 F.3d at 355-62, the Board majority in *Murphy Oil* found that this Court gave "too little weight" to the policies behind the NLRA (and too much to those behind the Federal Arbitration Act ("FAA")) and that the other circuits' decisions upholding class action waivers "add little to the equation here." 361 NLRB No. 72, at **9, 14 ("reaffirm[ing]" Board majority's decision in *D.R. Horton* because "its reasoning and its result were correct").

Moreover, despite the 30-day opt-out clause in Nanavati's Agreement, the Board found that Adecco required its employees to execute the Agreement as a condition of employment. (ROA.109-10.) Citing its decision in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), the Board held that "an opt-out procedure still imposes an unlawful mandatory condition of employment," and even if the opt-out provision rendered the Agreement non-mandatory, "an agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 rights." (ROA.110.) The Board's *On Assignment Staffing* decision had a short life: on June 6, 2016, this Court summarily granted the employer's petition for review in that case. (5th Cir. Case No. 15-60642, Dkt. #513535029 (per curiam).)

The Board also found that Adecco violated the NLRA when it invoked the Class Action Waiver and moved to compel Nanavati to arbitrate his wage and hour claims individually. (ROR.110.) The Board ordered Adecco to pay Nanavati's attorneys' fees in defending against Adecco's motion to compel (ROA.112), *even though the district court granted the motion*.

Finally, the Board found that the Agreement violated the NLRA by interfering with Nanavati's right to file ULP charges, even though (i) Nanavati did in fact file a ULP charge after Adecco filed its motion to compel in his wage and

hour lawsuit, and (ii) the Agreement expressly permitted Nanavati, who chose not to opt out of the Agreement, to file such charges notwithstanding its other terms. (ROA.110-11.) The Board found the Agreement's carve-out for certain administrative claims, *specifically including* ULP charges, "vague." (ROA.110.) The Board also deemed the Agreement's carve-out for ULP charges "illusory," because the Agreement tells the employee he or she is not excused from pursuing administrative claims if doing so is necessary before bringing a claim in arbitration. (ROA.111.) For example, notwithstanding the Agreement, an employee must still exhaust his administrative remedies with the EEOC before suing Adecco for alleged Title VII violations. In the Board's view, that correct statement of the law was "coercive" and somehow "reasonably conveys that *all* employment-related claims ultimately still must be resolved only through arbitration, not the Board" (*id.*), even though right above that line the Agreement says the employee can file charges with the NLRB.

2. The dissenting Board Member again defends employee arbitration agreements.

In his dissent, NLRB Member Miscimarra reiterated his dissenting opinion in the *Murphy Oil* decision, 361 NLRB No. 72, at *22-35, that "a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights," that "enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the [FAA]," and that "the legality of such a waiver is even more

self-evident when the agreement contains an *opt-out provision*, based on every employee's … Section 7 right to '*refrain from*' engaging in protected concerted activities." (ROA.114-15 (emphasis added).)

Member Miscimarra also concluded that the Board's attorneys' fee award was unenforceable, pointing out that the district court granted Adecco's motion to compel arbitration and that regardless of the outcome of that motion, this Court's decision in *Murphy Oil* alone gave Adecco more than a reasonable basis on which to seek arbitration of Nanavati's claims.[5] (ROA.115.) Finally, Member Miscimarra concluded that the Agreement's language allowing Nanavati to bring claims before the NLRB "notwithstanding the existence of an agreement to arbitrate … eliminates any possible uncertainty about the right of employees to file charges with the Board." (ROA.116.)

3. The Board orders broad personal and electronic notice and a nationwide posting.

In issuing its remedy, the Board ordered Adecco "to rescind or revise the Agreement," and notify all current and former Adecco employees who signed the Agreement that Adecco has in fact rescinded or revised the Agreement. If Adecco revises the Agreement, the Board's Order states, Adecco must provide each such employee with a copy of the revised agreement. (ROA.113.)

[5] There are a host of federal and state court decisions upholding class action waivers in employee arbitration agreements. (*See infra* at n.7.)

The Board also required Adecco to post a Notice to Employees that its Agreement violated the NLRA at (i) its San Bruno facility (Nanavati's location), and (ii) "all other facilities where the unlawful agreement is or has been in effect." (*Id*.) The Board further required that, in addition to those hard copy Notices, Adecco distribute the Notice electronically, whether by e-mail and/or an intranet/internet site, if Adecco "customarily communicates with its employees by such means." (*Id.*)

Finally, the Board's Order required that Adecco notify the federal district court in Nanavati's wage and hour lawsuit that it rescinded or revised its Agreement and that it no longer opposes the lawsuit on the basis of the Agreement's arbitration requirement. (*Id.*) The Board did this without addressing the practical difficulties with such a requirement. For instance, the Board did not consider the status of the district court case, i.e., was it already in arbitration or had final judgment been entered. Also, the Board did not explain how or why the district court would consider itself bound by the Board's Order, and regardless, the district court had already decided the issue and concluded that Adecco's Class Action Waiver was valid and enforceable. (*See supra* at 7.) In any event, the district court notification issue is now moot—Adecco and Nanavati settled his individual claims. (Case 5:14-cv-4145-BLF, Doc. 30 (June 27, 2016).)

SUMMARY OF ARGUMENT

This Court addressed the enforceability of class action waivers in employee arbitration agreements at least three times previously. Each time, this Court upheld the waivers in light of the FAA's "emphatic" policy in favor of arbitration agreements and the fact that nothing in the NLRA evinces a Congressional intent to prohibit employees and employers from mutually agreeing to resolve their disputes in arbitration on an individual basis. As the federal district court found, Nanavati freely and voluntarily agreed to the class action waiver in his Agreement with Adecco. Thus, under this Court's precedent, it should not enforce the Board's decision finding that the Adecco Agreement's class action waiver violates the NLRA. In fact, Adecco's class action waiver presents an even more compelling case for judicial intervention than those in *D.R. Horton* and *Murphy Oil*—Adecco's Agreement gives employees like Nanavati 30 days to opt-out of the waiver if they so choose, *without any consequences*. The Board had no basis—in law or fact—to order Adecco to rescind or revise its Agreement.

The Board certainly had no authority to award Nanavati his attorneys' fees in opposing a motion to compel arbitration that Adecco *won*. Whether or not the U.S. Supreme Court later accepts review and overrules *D.R. Horton* and *Murphy Oil* (and the other circuit courts that have upheld class action waivers like Adecco's), the First Amendment right of access to the courts protected Adecco's

motion in Nanavati's lawsuit. Adecco was merely defending itself against claims that Nanavati brought, so any NLRA-rooted concerns over retaliatory litigation are irrelevant. In any event, it is obvious that Adecco's motion was meritorious (the district court granted it) and as the Board concedes, Adecco presented the arbitration agreement to Nanavati as part of its normal hiring process and not for any unlawful purpose. Controlling Supreme Court and Fifth Circuit precedent bars the Board from sanctioning an employer for its non-NLRB litigation conduct.

The Board's alternative ground for finding Adecco's Agreement unenforceable—that an employee could read it and conclude that it prohibits him from filing ULP charges with the Board—is the textbook definition of arbitrary and capricious. First, the Agreement says the opposite—"*Regardless of any other terms of this … Agreement*, claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." The Agreement goes on to specify that the NLRB is on that list: "such administrative claims may include [those] brought before the … National Labor Relations Board." Hard to make it clearer than that.

Second, under the Board's own precedent, the test is whether a reasonable employee *would* interpret the agreement to prohibit filing ULP charges, not *could* he do so. That same precedent requires the Board to look at the agreement as a whole, and not splice excerpts from it and ponder their meaning in isolation. By

paying only lip service to its own precedent, and focusing on language in the agreement that (correctly) tells employees that they must still adhere to agency rules when pursuing administrative charges and exhaust administrative remedies if the law (not Adecco) requires them to do so, the Board manufactured confusion where none exists. At this point, it appears that no matter how clear an employer is in preserving its employees' right to file ULP charges, the Board will reject any class action waiver it sees. The Board has no authority to dictate the terms of an arbitration agreement between an employer and its employees, and the Board's actions in this case contradict the very purpose of the FAA. Under the litany of Supreme Court cases defending the FAA and its emphatic policy in favor of arbitration agreements, this Court should grant Adecco's petition on all grounds.

Finally, in the event there is enforcement of some portion of the Board's decision, this Court should reject the Board's punitive remedies. In particular, the Board required Adecco to deliver to each and every employee across the company who signed the Agreement a revised agreement with news that the old one was rescinded on account of the Board's decision. But the Board wanted more. It also ordered Adecco to do a nationwide posting of violation in each and every one of its facilities across the U.S.—and presumably in facilities Adecco doesn't even own or operate—where the Agreement "has been in effect." Whatever that phrase means, the Board went into overkill mode by insisting on personal, hard copy-

posting, ***and*** electronic (through multiple media) notice to approximately 100,000 employees, many of whom have no interest or tie to this proceeding. By doing so, the Board crossed the line from remedial to punitive, and assuming this Court rules against Adecco on the merits, it should deny enforcement of the Order requiring a nationwide and "mass electronic" posting.

STANDARD OF REVIEW

This Court reviews the Board's legal conclusions *de novo*, and will enforce a Board order only if its construction of the statute is reasonably defensible. *See e.g.*, *Dixie Elec. Membership Corp. v. NLRB*, 814 F.3d 752, 755 (5th Cir. 2016); *Murphy Oil*, 808 F.3d at 1017. This Court reviews constitutional questions *de novo*. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 419 n.34 (5th Cir. 1999) (citing 5 U.S.C. § 706).

While this Court gives *Chevron* deference to the Board's interpretation of the NLRA, *Macy's, Inc. v. NLRB*, 824 F.3d 557, 566 (5th Cir. 2016), "[r]eviewing courts are … not to stand aside and rubber stamp Board determinations that run contrary to the language or tenor of the [NLRA]." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 269 (1975); *see also NLRB v. Brown*, 380 U.S. 278, 290-91 (1965) ("When we used the phrase 'limited judicial review' we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases.").

The Board's award of remedies is reviewed for whether it is arbitrary or capricious. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (refusing to enforce remedy that is not tailored to the unfair labor practice that the remedy is designed to redress).

ARGUMENT

I. This Court should deny enforcement of the Board's Order because Adecco's Class Action Waiver is valid and enforceable under controlling law.

This Court can and should uphold Adecco's Class Action Waiver based solely on its decisions in *D.R. Horton* and *Murphy Oil*. Both decisions held that arbitration agreements with class actions waivers like Adecco's were enforceable as written, and this Court is bound to follow those decisions. "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

In *D.R. Horton*, this Court ruled that an employer does not violate the NLRA's concerted activity protections by requiring its employees to sign arbitration agreements that prohibit them from pursuing claims in a collective or class action. This Court held that the use of class action procedures "is not a substantive right" (not even in various employment-related statutes such as the

ADEA and FLSA), that the Board cannot fit its rule against class action waivers within the FAA's narrow "savings clause,"[6] that requiring a class mechanism "is an actual impediment to arbitration and violates the FAA," and that the NLRA does not contain "a congressional command to override the FAA." 737 F.3d at 355-62.

And later, when the NLRB ruled to the contrary in a case against Murphy Oil—after *D.R. Horton* became final upon the denial of *en banc* review—this Court reiterated its *D.R. Horton* holding and granted Murphy Oil's petition for review: "[T]he Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not lawful. Our decision was issued not quite two years ago; we will not repeat its analysis here." 808 F.3d at 1018 (internal citation omitted). On June 24, 2015, this Court denied the NLRB's motion for rehearing *en banc* in *Murphy Oil*.

This Court's analysis in *D.R. Horton* and *Murphy Oil* flatly reject the NLRB's rehashed ruling in this case, and thus, the outcome of Adecco's Petition is really a foregone conclusion. *See, e.g.*, *Citi Trends, Inc. v. NLRB*, 2016 WL 4245458, at *1 (5th Cir. Aug. 8, 2016) ("Although the Board asks us to reconsider our holdings in *D.R. Horton* and *Murphy Oil*, this Court is bound by its prior

[6] The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

published decisions."). Those decisions are "the law of this Circuit," and are "binding on the … Board, however great their displeasure with [them], as [they are] on us. It is the law which all must follow until such time as the Court *en banc* overrules the principle or the United States Supreme Court reaches a contrary decision." *NLRB v. Gibson Prods. Co.*, 494 F.2d 762, 766 (5th Cir. 1974).

Other circuit courts have noted that similar Board non-acquiescence is unacceptable. In *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1980), *cert denied*, 449 U.S. 975 (1980), the Second Circuit explained:

> Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this Court. When it disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay ***its proceedings*** in another case that arguably falls within the precedent of the first one.

Id. at 228 (emphasis added). Thus, the circuit court held, "the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow." *Id*. As the Sixth Circuit put it, "[a]lthough the Board is charged with the responsibility of formulating national labor policy, the court bears the final responsibility for interpreting the labor laws." *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 357 n.12 (6th Cir. 1983) (Board's refusal to apply binding circuit case law "is particularly disturbing").

Adecco's Agreement is even more generous to the employee than the agreements in *D.R. Horton* and *Murphy Oil*. In the latter cases, the arbitration agreement at issue did not include an opt-out provision. Adecco's Agreement does include such a provision—Nanavati was free (as were all employees) to notify Adecco within 30 days of signing the Agreement that he did not want to consent to bringing only individual claims in arbitration. That alone distinguishes Adecco's Agreement from the agreements that two courts found unlawful under the NLRA.[7]

[7] The Ninth Circuit held that class action waivers without an opt-out provision violate the NLRA. *Morris v. Ernst & Young, LLP*, -- F.3d --, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). The Seventh Circuit also invalidated an arbitration agreement that did not contain an employee opt-out clause. *Lewis v. Epic Systs. Corp.*, 823 F.3d 1147 (7th Cir. 2016). Two recent district court decisions from other circuits refused to follow the reasoning in *Lewis and Morris*. *See Bekele v. Lyft, Inc.*, -- F.Supp. 3d --, 2016 WL 4203412, at *18-21 (D. Mass. Aug. 9, 2016) (predicting 1st Circuit would follow *D.R. Horton*'s reasoning); *Bruster v. Uber Techs. Inc.*, 2016 WL 4086786, at *3 (N.D. Ohio Aug. 2, 2016) (*Johnmohammadi* controls because agreement had opt-out clause).

Indeed, two other circuit courts, as well as a host of district courts, agree with this Court that class action waivers do not violate the NLRA. *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (following Eighth Circuit's decision in *Owen*); *Palmer v. Convergys*, 2012 WL 425256, at n.2 (M.D. Ga.); *Tenet Healthsystem Philadelphia, Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa.); *Spears v. Mid-Am. Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan.); *De Oliveira v. Citicorp N. Am., Inc.*, 2012 WL 1831230, at *2 (M.D. Fla.).

And several other circuit courts have similarly held that the FAA demands enforcement of class action waivers in employment arbitration agreements, albeit without expressly discussing the NLRA. *E.g., Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-36 (11th Cir. 2014); *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014).

It is worth noting that in the Ninth Circuit, in which Nanavati worked, class action waivers *with* opt-out provisions like Adecco's are valid and enforceable. *See Johnmohammadi v. Bloomingdale's, Inc*., 755 F.3d 1072 (9th Cir. 2014). As with Adecco's Class Action Waiver, the arbitration agreement in Bloomingdale's permitted the employee to opt out within 30 days of signing. *Id.* at 1074. The court held the arbitration agreement did not interfere with Johnmohammadi's right to file a class action because if she wanted to retain that right, "nothing stopped her from opting out of the … agreement":

> Bloomingdale's merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis…. We fail to see how asking employees to choose between two options can be viewed as interfering with or restraining *their right to do anything*.

Id. at 1075-76 (emphasis added). Having freely-elected to arbitrate employment-related disputes on an individual basis, without interference from Bloomingdale's, she cannot claim that enforcement of the agreement violates … the NLRA." *Id.* at 1077.[8] And although the Ninth Circuit has since held that class action waivers violate the NLRA (*see supra* at n.7), it reaffirmed its ruling in *Bloomingdale's* that the presence of an opt-out provision makes the waiver valid and enforceable. *Morris*, 2016 WL 4433080, at *4 n.4, *supra* at n.9.

[8] Adecco relied extensively on *Bloomingdale's* in its briefing before the Board, yet the Board never mentioned the case in its Decision.

The same is true for Nanavati and Adecco's other employees who chose not to opt out of the Agreement. They cannot freely agree to arbitrate their disputes with Adecco on an individual basis, and then turn around and say that such an agreement violates their rights to engage in concerted activity under the NLRA. Adecco's Agreement does not violate the NLRA, and this Court should deny enforcement of the Board's Order to the contrary.

II. Even if the Supreme Court later holds that Adecco's Class Action Waiver is unlawful, the Board's award of attorneys' fees is not enforceable.

A. The Board is powerless to sanction employers for engaging in litigation activities except as allowed by the Supreme Court's decisions in *Bill Johnson's* and *BE&K Construction*.

Even if the U.S. Supreme Court accepted review of the class action waiver issue and rejected this Court's decisions in *D.R. Horton* and *Murphy Oil*, the NLRB cannot enforce its fee award against Adecco for two independent reasons. First, Nanavati agreed to settle his lawsuit against Adecco, and as part of that settlement, Adecco paid Nanavati a sum of money in exchange for his release of all claims against it. That settlement included payment on Nanavati's claim for attorneys' fees in that litigation. Those settlement proceeds satisfy the Board's award of fees that Nanavati incurred in opposing Adecco's motion to compel, *see, e.g.*, *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980)

(EEOC cannot recover same relief that plaintiff recovered in his private suit), especially since the district court *granted* Adecco's motion.

Second, apart from an ultimate determination on enforceability, the First Amendment protected Adecco's right to seek enforcement of its Class Action Waiver in Nanavati's lawsuit. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and a subsequent case, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), the Supreme Court held that the Board could issue remedies for non-NLRB litigation only if that litigation was both (i) meritless and (ii) retaliatory. Adecco's motion to compel was neither.

In *Bill Johnson's*, an employer sued union protestors for libel and blocking access to its restaurant. The union protestors filed a ULP charge with the Board alleging that the employer's lawsuit was retaliatory and violated their rights under the NLRA. 461 U.S. at 734-35. The Board found merit to the charge and ordered the employer to withdraw its state court lawsuit and reimburse the protestors for all their expenses in connection with the suit. *Id*. at 737.

The Supreme Court vacated the lower court's enforcement order. The Supreme Court held that, although the NLRA aims to protect Section 7 rights, and even though there was no doubt that an employer could use a lawsuit as a powerful instrument of coercion or retaliation, coercion and retaliation alone were insufficient to permit a remedy. *Id.* at 740-41. "[R]ecogniz[ing] that the right of

access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances,"[9] the Court held that the "filing and prosecution of a *well-founded* lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendants for exercising rights protected by the [NLRA]." *Id*. at 743, 748-49 (emphasis added) ("retaliatory motive and lack of reasonable basis are both essential prerequisites" to issuing a remedy in non-NLRB litigation).

BE&K Construction involved an employer's federal court lawsuit against a union for engaging in activities to delay a project because the employer had nonunion employees. The employer lost or withdrew each of its claims in its lawsuit. Afterward, the Board found that the employer had violated the NLRA by filing an unmeritorious lawsuit to retaliate against the union and chill its organizing activities. *Id*. at 521-23.

The Supreme Court again stepped in and rejected the Board's findings. The Court held that even an *unsuccessful* lawsuit is protected by the First Amendment—even if initiated for a retaliatory purpose—so long as the suit is not "objectively baseless." *Id*. at 531-33.

[9] "[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure-Tan*, 467 U.S. at 896-97.

Turning to this case, there is no conceivable basis for the Board's award of attorneys' fees to Nanavati, assuming in the first instance that Adecco's Class Action Waiver is deemed unenforceable.

First, the general rules in *Bill Johnson's* and *BE&K Construction* allowing sanctions for meritless, retaliatory litigation do not apply to the instant case: here, it was *Nanavati* that initiated litigation against Adecco, not the other way around. Adecco was merely *defending* itself in the litigation, as was its right. *Bill Johnson's* and *BE&K Construction* deal with potential unfair labor practices when *employers* file lawsuits—here, Adecco did not file any lawsuit in this case, nor did it file a counterclaim against Nanavati. This was precisely the reasoning of this Court in *Murphy Oil*, which distinguished the Murphy Oil's motion to compel arbitration from the employer's lawsuit in *Bill Johnson's* and refused to enforce the Board's fee award:

> The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson's may have been.

808 F.3d at 1021. The same is true here: Adecco was not retaliating against anyone when it sought to defend itself in the lawsuit that Nanavati initiated. In short, Adecco was entitled to present all its potential defenses without regard to the NLRA.

Second, there is no evidence in the record—not a single affidavit from Nanavati or any other Adecco employee (current or former)—that Adecco maintained the Agreement's Class Action Waiver for any retaliatory purpose. To the contrary, Adecco asked Nanavati to enter into the Agreement as part of its standard "onboarding" process that it uses with new hires, and he had the option to opt out of the Agreement within 30 days if he so chose. Not surprisingly, the Board's decision contains no reference to any evidence of retaliation.

Third, Adecco's motion to compel arbitration was not, as a matter of law, objectively baseless: the district court ***granted*** the motion and ordered Nanavati to arbitrate his claims against Adecco on an individual (not class) basis. And when Adecco filed its motion to compel, there were numerous cases upholding class action waivers in employee arbitration agreements, including this Court's *D.R. Horton* decision. These rulings are per se evidence that Adecco's motion had a reasonable basis in law, barring the Board from awarding Nanavati his attorneys' fees in opposing arbitration (which he agreed to in the first place).

Murphy Oil again controls. There, this Court noted that the Board (as it did here) based its fee award on the premise that Murphy Oil sought to enforce an agreement "that the Board deemed unlawful." 808 F.3d at 1021. But that argument, this Court held, was foreclosed by its decision in *D.R. Horton*, and "[t]hough the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold

that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law." *Id*. ("The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."). It's clear the Board did not heed this Court's admonition.

B. The Board erroneously relied on a narrow exception to the *Bill Johnson's* rule to impose an unlawful sanction.

Assuming *Bill Johnson's* applies in a case where the employer does not initiate any litigation (*see supra* at 26), there are two exceptions to the Supreme Court's "retaliatory/objectively baseless" sanctions rule, one of which the Board invoked in this case. In what is known as the "footnote 5" exception, the Supreme Court stated that the Board could enjoin lawsuits "beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law." 461 U.S. at 737 n.5. This case does not involve NLRA state-law preemption, because Adecco sought to compel arbitration based on the FAA in federal court. And the Board made no mention of this exception.

In passing, the Board cited the second exception—the "objective is illegal under federal law" exception—and asserted that it may restrain "litigation efforts such as [Adecco]'s motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, *even if the litigation was otherwise meritorious or reasonable*." (ROA.110 n.4 (emphasis added).)

The Board's conclusory assertion regarding the "footnote 5" exception makes no sense. First, it is logically inconsistent to say that an employer possesses an "illegal objective" in "enforcing an unlawful contractual provision" when in fact the litigation was not only meritorious, a reviewing court (the federal district court in Nanavati's lawsuit) held that the contractual provision at issue (Adecco's Class Action Waiver) is *valid and enforceable*. Thus, *Murphy Oil* specifically rejected the Board's attempt at invoking the "illegal objective under federal law" exception to award the charging party his attorneys' fees for opposing Murphy Oil's successful motion to compel arbitration. 808 F.3d at 1021.

Indeed, the Board seems to suggest that if it declares a contractual provision invalid under the NLRA (no matter what the federal judiciary says), an employer's use of the provision—even *before* the Board issues its decision—is an "illegal objective." That is absurd. If the phrase "objective that is illegal under federal law" is interpreted so broadly as to include any action that impairs rights under the NLRA, then the *Bill Johnson's* exception in footnote 5 would swallow the *Bill Johnson's* rule, which prohibits the Board from sanctioning non-NLRB litigation conduct (if meritorious) even if the employer *intended* to infringe on Section 7 rights and violate Section 8(a). 461 U.S. at 743. Thus, the Board cannot interpret the footnote 5 exception to allow sanctions against an employer for pursuing a meritorious motion to compel arbitration.

In fact, as a constitutional matter, the phrase "objective that is illegal under federal law" cannot extend beyond litigation conduct intended to circumvent a final and binding Board order. *See, e.g.*, *Chauffeurs, Teamsters & Helpers Local 776 v. NLRB*, 973 F.2d 230, 233, 236 (3d Cir. 1992) (upholding Board's interpretation of "illegal objective under federal law" to mean a party "continu[ing] to press its lawsuit" that is "incompatible with a Board ruling" and equating such an objective with Rule 11 sanctionable pleadings); *Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200*, 357 NLRB 2212, 2215 (2011) (footnote 5's "illegal objective under federal law" exception applied where union's lawsuit was "contrary to Board's 10(k) award" and union "pursued to arbitration a grievance seeking plastering work performed by employees of SDI that had been awarded by the Board to employees represented by Carpenters"). In fact, in *Chauffeurs, Teamsters & Helpers*, the circuit court emphasized that an "illegal objective" is where, unlike here, the party is "pursuing an action *it could not win*." 973 F.3d at 236 (emphasis added).

Here, Adecco *won* its motion to compel. That should end the inquiry. In any event, in filing its motion to compel, Adecco could not have sought to circumvent any Board order because the Board had not yet issued its decision in this case, and even then, it is not binding unless and until this Court denies review. Adecco's motion to compel plainly did not have an unlawful objective.

The Board's efforts to enforce its fee award against Adecco shun elementary concepts of *stare decisis*. The Board asks this Court to direct Adecco to rewrite history and request invalidation of a judicial decision in which Adecco clearly prevailed. This is an illogical request which demonstrates the Board's disregard for separation of powers principles between the executive and judicial branches of the federal government. Because there is no basis for any finding that Adecco's motion sought an "objective that is illegal under federal law," it is unconstitutionally improper for the Board to order Adecco to reimburse Nanavati for the attorneys' fees he incurred in opposing Adecco's motion to compel arbitration.

III. Adecco's arbitration agreement, with its express carve-out for Board proceedings, does not interfere with employees' right to pursue ULP charges.

The Board's independent finding that Adecco's Agreement violated Section 8 of the NLRA by interfering with employees' right to file ULP charges is arbitrary and capricious and cannot be enforced. The Board pointed to the Agreement's language requiring employees to bring all claims arising out of or relating to the employment relationship (or the Agreement) "only in their individual capacity, and not as a … class member in any purported class and/or collective proceeding," and concluded it "reasonably conveys to employees that, as a condition of employment, they must forfeit their substantive Section 7 right to file and pursue administrative charges with Board, whether individually or

collectively." (ROA.111.) Beyond the fact that Nanavati's filing of a ULP charge in this case obviously contradicts the Board's finding, the Board's interpretation of the Agreement is flawed for at least three reasons, each of which is sufficient to grant Adecco's Petition and deny the Board's cross-petition for enforcement on the ULP charge-filing issue.

A. Adecco's Agreement is not mandatory.

First, Adecco's Class Action Waiver was not a condition of employment—the Agreement contains an express opt-out provision whereby Nanavati, within 30 days of completing the "onboarding" paperwork, could have chosen not to submit to arbitration for *any* of his claims or disputes. (ROA.20.) By opting out, then, the employee can eliminate what the Board perceives as an obstacle to unfettered access to the Board. Thus, this case is unlike the cases the Board cites in which it rejected arbitration agreements with no opt-out provision like that contained in Adecco's Agreement. *E.g.*, *Solarcity*, 363 NLRB No. 83, at *6 (2015) (agreement conveyed to employees that, "*as a condition of employment*, they must forfeit their substantive Section 7 right[s]" (emphasis added)); *ISS Facility Servs., Inc.*, 363 NLRB No. 160, at *3 (2016) (same); *Supply Techs., LLC*, 359 NLRB No. 38, at *4 (2012) ("The [a]greement makes abundantly clear that employees had *no choice* but to sign it and submit to the [grievance-arbitration] program: if they did not comply, their employment would be *terminated*." (emphasis added)); *Bill's Elec.*,

Inc., 350 NLRB No. 31, at *7-8 (2007) (mandatory arbitration policy threatened that any applicant or employee who sought Board relief before completion of the arbitration process may have to bear all costs of any litigation to compel compliance with that process).

The concern underlying those cases was that the employee would abstain from engaging in protected activity (filing a ULP charge) because of fear of punishment from the employer for breaking the rules. *Solarcity*, 363 NLRB No. 83, at *6 ("The rationale underlying these decisions is that, absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights."). That is not a concern here: if employees reading Adecco's Agreement think that it may somehow restrict their right to pursue relief with the NLRB, they can simply reject the Agreement within 30 days of signing it. And if they take that simple step, they "will not be subject to any adverse employment action as a consequence of that decision." (ROA.20.)

B. Adecco's Agreement tells employees they can file ULP charges.

Second, Adecco's Class Action Waiver includes an express exception: it does *not* apply to "claims or charges brought before the … National Labor Relations Board." (ROA.19.) Even the Board concedes there is a provision in the Agreement "stating that the Agreement does not prohibit the filing of Board

charges." (ROA.110.) The Agreement's carve-out for ULP charges is more than sufficient under this Court's precedent to withstand Board scrutiny: in *Murphy Oil*, this Court held that an express carve-out stating that employees are permitted to file ULP charge with the Board will cure any allegedly "confusing" or "incompatible" language. 808 F.3d at 1019; *see also Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014) (unlawful "chilling" of section 7 rights where provision in policy "gives *no indication* that some personnel information, such as wages, is not included within its scope" (emphasis added)). Adecco's carve-out for ULP charge does more than "indicate" that employees can pursue relief with the Board—it expressly tells them they can.

In the EEOC-charge context, courts have upheld carve-outs that do not even mention the agency by name (which Adecco's Agreement does), but instead refer more generically to the right to "participat[e] in a proceeding with any appropriate federal, state, or local government agency enforcing discrimination laws." *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 342 n.4 (7th Cir. 2015) ("Moreover, the Agreement expressly states that its general release provision does not apply to rights that the signature cannot lawfully waive. Therefore, the district court correctly concluded that it is unreasonable to construe the Agreement as restricting the signatory from filing a charge …."); *see also Thiessen v. Gen. Elec. Capital Corp.*, 232 F. Supp.2d 1230, 1242 n.5 (D. Kan. 2002) (right to file charges

preserved by provision stating that "nothing herein shall prevent the Employee from communicating with or cooperating with any U.S. Governmental investigation" (quotations omitted)). Adecco's express carve-out for NLRB charges guarantees the enforceability of its Agreement.

1. In rejecting the Agreement's carve-out, the Board ignores its own precedent.

The Board characterized as "confusing" language stating that filing ULP charges is permitted "if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." (ROA.19.) That caveat, the Board decided, "could not reasonably be understood by employees as having no effect on their right to file Board charges." (ROA.111.) But the Board ignores the very next sentence after that: "*Such administrative claims may include without limitation claims or charges brought before the … National Labor Relations Board*." (ROA.19 (emphasis added).) Again, problem solved.

And this Court can reach that conclusion without even considering the bolded, capitalized language in the Waiver itself: "**BY SIGNING THIS AGREEMENT, THE PARTIES HEREBY WAIVE THEIR RIGHT TO HAVE ANY DISPUTE, CLAIM OR CONTROVERSY DECIDED <u>BY A JUDGE OR JURY IN COURT</u>**." (ROA.19 (emphasis added).) That provision meshes perfectly with the "Regardless of any other terms of this … Agreement" clause that leads right into the stated exception for ULP charges. (*Id*.) Read

together, these provisions would lead a reasonable employee to understand that the Class Action Waiver deals with claims and disputes brought in a *court* lawsuit, not charges brought before the Board.[10] *Cf. EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1089 (5th Cir. 1987) (holding that no language in severance agreement barred employee's right to file charge; "a charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit." (quotations omitted)).

The Board's cherry picking of the "if applicable law permits access to such an agency" sentence—ignoring the text both before and after that sentence—contradicts its own precedent that it is improper to rely on "particular phrases in isolation" and to "presume improper interference with employee rights … simply because the rule *could* be interpreted" a certain way. *Lutheran Heritage*, 343 NLRB 646, 646 (2004) (emphasis added); *STAR, Inc*., 347 NLRB 82, 83 n.3 (2006) (same); *see also Filtron Co*., 134 NLRB 1691, 1700 (1961) ("[I]n ascertaining the meaning of any provision of a contract, that provision should be read in the light of the contract as a whole, not in isolation, and that each provision, if possible, should be interpreted so as to harmonize with the other provisions."); *First Nat'l Supermarkets, Inc*., 302 NLRB 727 (1991) (release of "any and all … claims of any kind which are now pending or which could be filed in the future

[10] Notably, Adecco's Agreement spells out eight specific federal laws (and various common law causes of action) that fall within the Agreement's scope, and the NLRA is not on that list. (ROA.19.)

relating to or arising out of my total employment and my termination" did not restrict right to file ULP charges in future; "[w]hile the phrase 'total employment may appear ambiguous in isolation, we think its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding Hoopes' discharge").

As dissenting Member Miscimarra explained, carve-out provisions like those found in Adecco's Agreement are "not ambiguous—but even if they were, mere ambiguity is not enough under the [*Lutheran Heritage* test] to condemn a rule as unlawful":

> The word *ambiguous* means 'capable of being understood in two or more possible senses or ways.' Thus, a rule is ambiguous if it *could* be read to prohibit Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way.[11]

Solarcity Corp., 363 NLRB No. 83, at *10 n.16 (internal citation omitted); *see Lutheran Heritage*, 343 NLRB at 647 ("To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. *We decline to take that approach*." (emphasis added)).

[11] *See ISS Facility Servs., Inc.*, 363 NLRB No. 160, at *3 (2016) ("The Board applies its Lutheran Heritage … test to determine whether a reasonable employee *would* construe the [arbitration agreement] to prohibit the filing of Board charges, raising the prospect that the employee *would* be chilled from doing so." (emphasis added)).

2. The Agreement's carve-out for ULP charges is not "illusory."

The Board also referred to the Agreement's stated exception for ULP charges as "illusory," because later in that section, the Agreement reminds employees that they must still "fulfill [their] obligation to exhaust administrative remedies before making a claim in arbitration." (ROA.19.) According to the Board, that statement of black-letter law "reasonably conveys that all employment-related claims ultimately still must be resolved only through arbitration, not the Board." (ROA.111.) No it doesn't. What it conveys is the fact that if employees want to sue Adecco, they are not excused from complying with exhaustion requirements that the law—*not Adecco*—imposes. The Board can't fault Adecco for making a correct statement of law that ensures employees' claims *against it* can go forward in court. In other words, Adecco gets no benefit from adding that clause—it was intended to make sure employees didn't waive *their* rights.[12]

Moreover, the exhaustion provision actually prompts the employee to invoke the Board process (which is what the Board wants), *not* shy away from it. If an employee mistakenly believed that it had to arbitrate ULP charges against Adecco, he or she would read the exhaustion requirement and understandably file a charge with the Board first even if the employee may expect to get before an arbitrator at

[12] In fact, had Adecco not included this caveat about exhaustion, the Board would probably have found that Adecco unlawfully lured its employees into waiving certain claims against Adecco.

some later point. Once the employee files, however, he or she is free and clear of any perceived obstacle that might concern the Board—the ULP is safe and secure before the Board, which we can expect not to dismiss it on account of any arbitration agreement.[13]

The *Lutheran Heritage* test is premised on the recognition that language which would predictably be understood only by someone with specialized legal knowledge will not render lawful an otherwise illegal rule. Yet the Board has turned its precedent on its head: "Every employee who reads English would understand the [arbitration] [a]greements have no impact on NLRB charge-filing, since this is precisely what the Agreements say." 363 NLRB No. 83, at *8-10 (Miscimarra, dissenting). But the Board has "devised an implausible interpretation that … could only be advocated or adopted *by lawyers*." *Id.* (emphasis added). Only a lawyer could isolate and twist snippets of the Agreement and argue for an interpretation that prohibits the filing of ULP charges when the Agreement says *the opposite*. *See Murphy Oil*, 808 F.3d at 1020 ("[I]t would be unreasonable for an

[13] For this same reason, this Court can dismiss the Board's purported concern that "even if an employee could [again, the correct test is "would"] determine … that he could invoke the Board's processes, an inherent ambiguity … suggests that he must do individually, and not in concert with other employees." (ROA.111.) Once the Board has the employee's charge, it can decide to pursue it on a collective basis. In any event, the Board's argument rests on its erroneous assumption that an employee reading the carve-out language in Paragraph 4 would not understand that the Agreement does not apply to certain administrative charges, specifically including "charges brought before … the [NLRB]." (ROA.19, *supra* at 33-34.)

employee to construe the [arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite.").

At the end of the day, the Board's analysis leads to the question whether the Board would *ever* accept any carve-out language as sufficient to protect NLRB charge-filing. Indeed, the Board has gone so far as to find that a carve-out providing that "[n]otwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the [NLRA] to file charges with the [NLRB]" did not save the agreement from an unlawful "chilling" effect, since the text was not bolded and appeared on page three of a six-page document. *Ralph's Grocery Co*., 363 NLRB No. 128, at *2 (2016).

The Board's actions in rejecting nearly every arbitration agreement that comes before it is beyond arbitrary and capricious—the Board has made it its goal to outlaw any and all class action waivers in employee arbitration agreements. But that is Congress's call, not the Board's, as explained more fully below.

C. The Board lacks authority to dictate the terms of employee arbitration agreements.

The Board cannot tell employers what they must include in their arbitration agreements. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which was decided after *D.R. Horton*, the Supreme Court held that under the FAA, which applies to employment agreements, a class action waiver must be enforced according to its terms in the absence of a "contrary congressional

command" in the federal statute at issue. *Id*. at 2309; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 683 (2010) (parties to an arbitration agreement "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes" (emphasis added)).

Thus, arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary congressional command." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985). Any such expression of congressional intent to preclude the waiver of judicial remedies must be clear and unequivocal. *E.g*., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

The Supreme Court's oft-repeated "emphatic federal policy in favor" of arbitration does not permit agencies such as the Board to regulate an agreement's contents, unless the statute (here, the NLRA) expressly permits the agency to do so. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). As *D.R. Horton* and *Murphy Oil* make clear, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to preclude an employee from waiving a procedural right to file a class action when agreeing to arbitrate employment-related claims. 737 F.3d at 360-62 ("courts repeatedly have understood the NLRA

to permit and require arbitration, [and] [h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA").

Thus, just as the Board cannot insist that employers remove class action waivers from their arbitration agreements (see *D.R. Horton* and *Murphy Oil*), it cannot insist that employers add language expounding on the employee's right to file ULP charges. *See, e.g., Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (Board lacks authority to promulgate rules requiring employers to circulate notices informing employees of their rights under the NLRA). Under the FAA, arbitration agreements must be enforced according to their terms, not terms that government agencies set. *See AT&T Mobility, Inc. v. Concepcion*, 563 U.S. 333, 344-45 (2011).

If each and every federal and state agency insisted that employees add to arbitration agreements language about employee rights to pursue claims or charges in that agency's realm, the agreements would become unwieldy and needlessly complicated despite the parties' intent to resolve their disputes in an efficient manner. This result flies in the face of the FAA's mandate, and thus this Court should not defer to the Board's Decision. "[W]here, as here, the review is not a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests [the FAA vs. NLRA], the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized

assumption by an agency of major policy decisions properly made by Congress." *Brown*, 380 U.S. at 292 ("Courts must, of course, set aside Board decisions which rest on erroneous legal foundation." (quotations omitted)). This Court should step in to stop the tide of the Board rejecting employee arbitration agreements by any means possible.

IV. The Board's requirement for a nationwide posting is arbitrary and capricious.

Assuming that any portion of the Board's Decision and Order is enforceable, this Court should deny enforcement of the requirement that Adecco post notices in each and every one of its facilities across the country. This ULP charge arose out of Adecco's enforcement of its arbitration agreement against *one* employee at a *single* facility. Still, the Board is requiring Adecco to notify *personally* each and every employee who signed the Agreement that Adecco had to rescind or revise it (which the Board has no authority to order, *supra* at 40-42). Under these circumstances, a nationwide posting and an e-mail/Intranet/Internet alert to tens of thousands of employees in tens of thousands of facilities is unnecessary and indeed draconian.

The Board has some discretion in fashioning orders that "effectuate the policies of [the Act]." 29 U.S.C. § 160(c); *see Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). However, the Board's orders must be remedial, not punitive. *E.g.*, *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151,

156-157 (2d Cir. 1991). Any relief "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." *Sure-Tan*, 467 U.S. at 900; *Manhattan Eye Ear*, 942 F.2d at 157. In other words, "this court is a reviewing court and does not function simply as the Board's enforcement arm. It is [a court's] responsibility to examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, [and] selected a course which is remedial rather than punitive." *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980).

A nationwide posting order is "properly remedial where either *the evidence* supports an inference that the employer will commit further unlawful acts at a substantial number of other sites or the *record* shows that employees at other sites are aware of the unfair labor practices and may be deterred from them engaging in protected activities." *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 585 (2d Cir. 1994) (quotations omitted). The record in this case supports neither inference, as there is no factual record *whatsoever* because the Board insisted on adjudicating this case on summary judgment. There was no hearing. The Board presented no evidence other than the Agreement. There is nothing in the record about other Adecco employees and their agreements, or what those agreements say. Perhaps some of them have had their arbitration agreements amended. And the

Board has no idea whether those employees with arbitration agreements like Nanavati's have been deterred from filing ULP charges. (We know Nanavati wasn't.) In fact, there is no evidence on how many employees opted out of the Agreement, and how or why they chose to do so. In short, there is no way to justify the burden of a nationwide posting on this minimal record, especially where, as here, the employees actually affected would receive personal notice through receipt of a revised agreement (if the Court enforced any material part of the Board's decision). *See, e.g.*, *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 189 (2d Cir. 1991) ("Notwithstanding th[e] limited scope of review, courts are authorized to refuse to enforce Board-ordered remedies when enforcement would be unnecessary or futile." (quotations omitted)).

The Board's requirement that Adecco post a notice "at all other facilities where the unlawful agreement is or *has been in effect*" is also vague. (ROA.113.) That sweeping requirement surely should not encompass every facility where an Adecco employee works from time to time. Adecco employs temporary employees, who are then assigned to Adecco client sites in various locations to perform a variety of services, depending on the client's needs. Read literally, the Board's posting requirement would require posting of a notice inside the facilities of potentially tens of thousands of businesses (both small and large) with zero connection to this dispute whatsoever. Such a vague and vastly overbroad

requirement cannot stand. *See McGraw-Edison Co. v. NLRB*, 533 F.2d 1266, 1268-69 (D.C. Cir. 1976) (requiring amendment to tailor vague and overbroad Board order). Requiring a posting at all those client sites does not effectuate the NLRA; it is purely penal.

If the Court enforces any part of the Board's decision, this Court should not enforce the nationwide and electronic-posting remedies. It is more than sufficient—if there is any basis to enforce—that Adecco would notify the actual (alleged) victims—each employee who signed the Agreement—that he or she must sign a revised agreement because the Board found the prior one unlawful. Forcing Adecco to incur the expense and undergo the burden of a massive nationwide and electronic notice is pointless and retaliatory.

CONCLUSION

The Court should grant Adecco's Petition for Review and deny the Board's request for enforcement of its May 24, 2016 Decision and Order.

DATED this 22nd day of September, 2016.

STEPTOE & JOHNSON LLP

By s/ Douglas D. Janicik
Steven D. Wheeless
Douglas D. Janicik
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382

Attorneys for Petitioner
Adecco USA, Inc.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Fifth Circuit Rule 32-1, the foregoing Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,086 words.

DATED this 22nd day of September, 2016.

s/ Douglas D. Janicik

CERTIFICATE OF SERVICE

I certify that on September 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Court's CM/ECF system. I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

Linda Dreeben
appellatecourt@nlrb.gov
linda.dreeben@nlrb.gov

Jared Cantor
Jared.cantor@nlrb.gov

Kira Vol
Kira.vol@nlrb.gov

I further certify that on September 22, 2016, I mailed a copy of Petitioner's Opening Brief, via First Class U.S. mail, to:

Mr. George P. Velastegui
Ms. Judy Chang
National Labor Relations Board
Region 32
Suite 300N
1301 Clay Street
Oakland, CA 94612-5211

s/ Douglas D. Janicik

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INCORPORATED	)	
Petitioner	)	
v.	)	No. 16-60375
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

MOTION TO HOLD CASE IN ABEYANCE

To the Honorable, the Judges of the United States
Court of Appeals for the Fifth Circuit:

The National Labor Relations Board ("the Board") moves the Court to hold this case in abeyance until the time for petitioning the Supreme Court for a writ of certiorari in *Murphy Oil USA, Inc. v. NLRB*, 5th Cir. Case No. 14-60800, has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case. The Board states the following in support:

1. On May 24, 2016, the Board issued a Decision and Order finding that Adecco USA, Inc. ("the Company"), violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, 158(a)(1), by maintaining a mandatory arbitration agreement that: employees reasonably would believe bars or

restricts the right to file charges with the National Labor Relations Board; and requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

364 NLRB No. 9.

2. In support of its findings, the Board cited to, and applied its decisions in, *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). In both cases, this Court rejected the Board's findings that the maintenance of a mandatory arbitration agreement violated Section 8(a)(1) of the NLRA to the extent the agreement barred concerted pursuit of work-related legal claims in any forum, and denied enforcement of that violation. In *Murphy Oil*, the Court also denied enforcement of a violation based on enforcement of such an agreement.

3. On May 13, 2016, the Court denied the Board's petition for the Court to rehear *Murphy Oil* en banc and, on May 23, 2016, issued mandate in that case. The government has 90 days from the denial of the petition for rehearing – until August 11, 2016 – to determine whether to petition the Supreme Court for a writ of certiorari.

4. The Board Decision and Order under review here presents identical issues to those in *Murphy Oil*. Accordingly, in the interest of judicial economy, the Board requests that the Court hold this case in abeyance until the time for petitioning for certiorari has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case.

5. This Court has previously placed numerous similar cases in abeyance pending the resolution of *Murphy Oil*. *See, e.g.*, *Neiman Marcus Group, LLC v. NLRB*, Case No. 15-60572 (holding in abeyance "until the time for petitioning the Supreme Court for a writ of certiorari in *Murphy Oil* . . . has passed, and, in the event that such a petition is filed, until the Supreme Court resolves the case"); *Brinker Int'l Payroll Co., L.P. v. NLRB*, Case No. 15-60859 (holding in abeyance "until petition for rehearing en banc is resolved and time for petitioning the Supreme Court for a writ of certiorari has passed" in *Murphy Oil*); *Acuity Specialty Products, Incorporated, doing business as Zep, Incorporated*, Case No. 16-60367 (holding in abeyance "until the time for petitioning for certiorari in *Murphy Oil USA, Inc. v. NLRB"*); *Lincoln Eastern Management Corporation*, Case No.16-60401 (holding in abeyance "until the time for petitioning the Supreme Court for a writ of certiorari in *Murphy Oil* . . . has passed, and, in the event that such a petition is filed, until the Supreme Court resolves the case"); *Am. Express Travel Related Servs. Co. v. NLRB*, Case No. 15-60830 (placing into abeyance "pending

the final resolution of" *Murphy Oil*). In other cases, however, the Court has denied the Board's motion for a stay. *See 24-Hour Fitness USA, Inc. v. NLRB*, Case No. 15-60005; *Securitas Security Serv. USA, Inc. v. NLRB*, Case No. 16-60304 (May 26, 2016); *RGIS, LLC v. NLRB*, Case No. 16-60129 (Mar. 28, 2016); *Employers Resource v. NLRB*, Case No. 16-60034 (Feb. 22, 2016); *Citi Trends, Inc. v. NLRB*, Case No. 15-60913 (Feb. 16, 2016). In addition, since issuing mandate in *Murphy Oil*, the Court has issued letters in several stayed cases explaining that the case will remain in abeyance until the time for petitioning for certiorari has passed.[1] In other cases, the Court has lifted the stay, either sua sponte or upon a party's motion. *See, e.g., On Assignment Staffing Servs. Inc. v. NLRB*, Case No. 15-60642 (May 24, 2016); *Prof'l Janitorial Serv. of Houston, Inc. v NLRB*, Case No. 15-60858 (May 23, 2016)); *PJ Cheese, Inc. v. NLRB*, Case No. 15-60610 (April 19, 2016).

[1] More specifically, on May 23, 2016, after issuing mandate in *Murphy Oil*, the Court issued Letters of Advisement in approximately 10 cases, informing the parties that it had reactivated the cases. *See, e.g., Citigroup Technology, Inc. v. NLRB*, Case No. 15-60856 (May 23, 2016); *Kmart Corp. v. NLRB*, Case No. 15-60897 (May 23, 2016) (same); *Domino's Pizza, LLC v. NLRB*, Case No. 15-60914 (May 23, 2016) (same). The next day, the Court issued a Memorandum in many of those cases placing the case back into abeyance until the time for petitioning the Supreme Court has passed. Although the parties received those memoranda by ecf notification, they do not appear on PACER. We have attached as Exhibit A the Memoranda received by the Board on June 3, 2016 in *American Express Travel Related Services. Co. v. NLRB*, Case No. 15-60830, which is nearly identical to the memoranda received in those other cases on May 24, 2016.

6. The need for an abeyance is particularly warranted given that the Board has continued issuing orders presenting identical issues to those in *Murphy Oil*, many of which parties may petition this Court to review under the NLRA's broad venue provision. *See Murphy Oil*, 2015 WL 6457613, at *1, 4.

7. Counsel for the Company opposes the Board's motion.

WHEREFORE, the Board respectfully requests that the Court hold this case in abeyance until the time for petitioning for certiorari in *Murphy Oil* has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of July, 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner	)	
v.	)	No. 16-60375
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that on July 13, 2016, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 13th day of July, 2016

- EXHIBIT A -

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 03, 2016

Ms Linda Dreeben
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
1015 Half Street, S.E.
Suite 4163
Washington, DC 20570

No. 15-60830 American Express Travel v. NLRB
USDC No. 28-CA-123865

Dear Ms Dreeben,

When the mandate issued in 14-60800 this appeal was prematurely removed from abeyance. In light of the request to hold this case in abeyance pending final resolution of 14-60800, including the time for fling petition for writ of certiorari, the appeal is now placed back in abeyance.

Counsel should file status reports regarding this matter through ECF every thirty (30) days from the date of this letter.

Sincerely,

LYLE W CAYCE, Clerk
Cindy M. Broadhead
By: _____
Cindy M. Broadhead, Deputy Clerk
504-310-7707

cc:
Ms Jennifer Abruzzo
Ms Nicole Buffalano
Mr. Jeffrey William Burritt
Mr. Ross H. Friedman
Mr. Richard F. Griffin Jr.
Ms Allyson Newton Ho
Ms Martha Elaine Kinard
Mr. Richard G. Rosenblatt
Ms Marissa E. Thielen
Ms Kira Dellinger Vol

EXHIBIT 3

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner/Cross-Respondent	)	
v.	)	**No. 16-60375**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

OPPOSED MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO STAY CASE PENDING SUPREME COURT'S REVIEW OF CERTIORARI PETITIONS IN RELATED CASES

To the Honorable, the Judges of the United States
Court of Appeals for Fifth Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, moves this Court to stay this case until the completion of Supreme Court proceedings in three cases with pending petitions for writs of certiorari that present the identical issue as the principal issue in this case.

1. On May 24, 2016, the Board issued a Decision and Order finding that Adecco USA, Inc. ("the Company") violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, 158(a)(1), by maintaining and enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain employment-related class

or collective actions in all forums, whether arbitral or judicial. 364 NLRB No. 9.[1] The Board reached that conclusion by applying its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016).

2. The Company petitioned this Court to review the Board's Order, and its opening brief is currently due on September 22, 2016.[2]

3. In the last two weeks, there have been important developments in three cases addressing the principal issue in this case. On Friday, September 9, the Board filed a petition with the Supreme Court seeking a writ of certiorari to review this Court's *Murphy Oil* decision. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). Likewise, in the week prior, parties had filed petitions for certiorari in Seventh Circuit and Ninth Circuit cases finding arbitration agreements unlawful pursuant to the Board's *Murphy Oil* rationale. *See Lewis v. Epic Sys.*

[1] The Board found that the Company also violated Section 8(a)(1) by maintaining an arbitration agreement that employees would reasonably believe bars or restricts them from filing charges with the Board.

[2] On July 19, 2016, the Court denied the Board's opposed motion to stay proceedings until the time for petitioning the Supreme Court for a writ of certiorari in *Murphy Oil* had passed, and in the event that such a petition was filled, until the Supreme Court resolved the petition.

Corp., 823 F.3d 1147 (7th Cir. 2016), *petition for cert. pending*, No. 16-285 (filed Sept. 2, 2016); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016).

4. As the Board's petition to the Supreme Court explains, a clear circuit split has now emerged with respect to this issue. The Second and Eighth Circuits have joined this Court in rejecting the Board's rationale. *See Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sep. 7, 2016) (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298 n.8 (2d Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016) (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013)). The Seventh and Ninth Circuits, by contrast, have agreed with the Board's position. *See Morris*, *supra*, and *Lewis*, *supra*. That existing conflict may continue to grow in the near future as cases that raise this issue are pending in five additional circuits.[3] Moreover, the issue of whether mandatory individual-arbitration agreements are unlawful and unenforceable is of exceptional legal and practical importance. The Board has found that such agreements threaten the

[3] *See, e.g.*, *The Rose Group v. NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB v. Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc. v. NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc. v. NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

NLRA's "core objective": "the protection of workers' ability to act in concert, in support of one another." *Murphy Oil USA, Inc.*, 2014 WL 5465454, at *1. Resolving the issue of their enforceability will have a direct and immediate effect on countless employees and employers because these agreements have become so widespread.

5. Each of the cases now pending before the Supreme Court on petitions for certiorari would, if that Court grants certiorari and issues a decision on the merits, definitively resolve the key issue of whether an employer violates the NLRA by maintaining an individual-arbitration agreement that requires employees to waive the collective pursuit of work-related disputes. Accordingly, in the interest of judicial economy, the Board requests that the Court stay this case until the Supreme Court proceedings are completed.

6. Counsel for the Company opposes the Board's motion.

WHEREFORE, the Board respectfully requests that the Court stay this case until after the Supreme Court proceedings in *Murphy Oil*, *Ernst & Young*, and/or *Epic Systems* are completed.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 19th day of September, 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner/Cross-Respondent	)	
v.	)	**No. 16-60375**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 19th day of September, 2016